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NO. 86-1375

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1986

RALPH L. HARVEY,
Petitioner,

v.

HOLT OIL & GAS CORPORATION and
FAYWIN INVESTMENTS PTY. LTD.,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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March 20, 1987

LIST OF PARTIES

The parties to the proceedings below were the Petitioner Ralph L. Harvey and the Respondents Holt Oil & Gas Corporation and Faywin Investments Pty. Ltd. Respondents have no parent companies, subsidiaries or affiliates to list pursuant to Rule 28.1.

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Petition - Petition for Writ of Certiorari

NO. 86-1375

In The
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RALPH L. HARVEY,
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HOLT OIL & GAS CORPORATION and
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BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Respondents Holt Oil & Gas Corporation and Faywin Investments Pty. Ltd., submit this response in opposition to Ralph L. Harvey's Petition for Writ of Certiorari to the United States Court of Appeals for the

Fifth Circuit.[1] The opinion below is reported at 801 F.2d 773 (1986).

SUMMARY OF ARGUMENT

Ralph L. Harvey, petitioner for a writ of certiorari before this Court, presents a single question for review. The single question Harvey poses is "[w]hether due process permitted a court in Texas to assert in personam jurisdiction over a resident of Oklahoma in a contract action despite a clause in the contract that selected Oklahoma as the forum for disputes."

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1. Holt Oil & Gas Corporation assigned its interest in this lawsuit to Faywin Investments Pty. Ltd. In accord with the practice followed throughout these proceedings, Respondents will be referred to simply as "Holt" and Petitioner as "Harvey." The Petition for Writ of Certiorari will be referred to as the "Petition."

(Petition at I). This question is improper for review by this Court for the following reasons:

I) Harvey completely mischaracterizes the contract clause in question. The contract clause is a choice-of-law clause, not a forum selection clause. The parties agreed to apply Oklahoma law to resolve disputes pertaining to their agreement; they did not agree on a forum in which to bring suit.

II) The issue here presented by Harvey was not properly preserved or considered below. Harvey did not argue below, to either the trial or appellate court, that this obvious choice-of-law clause was a forum selection clause. Harvey cannot now rewrite the contract

and ask this Court to interpret unambiguous contractual language. By attempting to do so, Harvey brings before this Court a routine, fact specific inquiry on contract construction and interpretation not raised below which would necessitate this Court engage in fact finding on issues for which no evidence exists in the record. Furthermore, the question Harvey poses for review is actually an argument for improper venue which Harvey waived by not raising in his pre-answer motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b).

III) No due process concerns are implicated by Harvey's Petition.

IV) In all respects, this decision fully accords with decisions in other

courts, precluding Harvey's claim of conflict among the circuit courts.

In summary, Harvey's Petition for Writ of Certiorari presents no proper question worthy of review by this Court.

STATEMENT OF THE CASE

The opinion of the appellate court fairly summarizes the pertinent facts in this case.

Harvey's Petition "restricts itself solely to the question whether a federal court sitting as a court of Texas properly asserted in personam jurisdiction over a citizen of Oklahoma in a dispute arising out of oil exploration in Oklahoma that took place under a contract that selected Oklahoma procedure to 'determine' remedies for breach" (Petition at 2-3); therefore,

most of the factual allegations in Harvey's statement of the case are not germane to the issue presented for review. For this reason, Holt will not burden the Court with a discussion of the various errors in the factual statement of the Petition. However, as discussed infra, Holt takes issue with Harvey's contention that Oklahoma was selected as the "forum" for suits. (Petition at 3). Holt contends the contract merely required the trial court to apply the substantive law of Oklahoma and this is exactly what the court did at the trial of this case.

REASONS FOR DENYING THE WRIT

I.

HARVEY MISCHARACTERIZES A CHOICE-OF-LAW CLAUSE AS A FORUM SELECTION CLAUSE

This Court should deny Harvey's

Petition for the simple reason Harvey misconstrues a clear and unambiguous choice-of-law clause, attempting to portray it as an exclusive forum selection clause. The relevant clause states as follows:

> B. Governing Law: The essential validity of this agreement and all matters pertaining thereto, including, but not limited to, matters of performance, non-performance, breach, remedies, procedures, rights, duties and interpretation or construction, shall be governed and determined by the law of the state in which the Contract Area is located. . . .[2]

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[2]. The law of the state in which the "Contract Area" is located is the law of Oklahoma.

(Harvey App. 38a). As the Court can plainly see, this clause is patently and expressly a choice-of-law clause appointing Oklahoma law as the "governing law" on all issues pertaining to the parties' agreement.

Harvey confuses three distinct concepts: choice-of-law, forum selection and consent to jurisdiction. Choice-of-law is the only concept relevant to this contract. Merely selecting which state's law will govern a business relationship is not a de facto agreement to submit to the jurisdiction of that court, absent an "express contractual understanding to that effect." See Agrashell, Inc. v.

Bernard Sirotta Co., 344 F.2d 583, 588 (2d Cir. 1965).[3]

The unassailable rule of contract construction provides that language will be given its ordinary meaning, unless a different meaning was clearly intended. See 3 A. Corbin, Contracts §542 (1960). Yet, throughout his Petition, Harvey selectively quotes from this provision the words "procedures" and "determined" in a constrained effort to persuade this Court that the provision is a forum selection provision. By rearranging the syntax of this provision, Harvey

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3. Parties may well agree to a choice-of-law provision simply to curtail potentially expensive and time consuming problems of comparative law. See Bennett Industries, Inc. v. Laher, 557 F.Supp. 965, 968 (N.D. Texas 1983).

cannot succeed in altering the ordinary meaning of the language of this provision which remains simply and unambiguously a choice-of-law clause, duly honored by the parties and the trial court.

Harvey illustrates his confusion by asserting the result below nullifies this Court's decision in The Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972). At issue in the landmark Bremen decision was the enforceability of a forum selection clause in a maritime towage contract between an American plaintiff and a German defendant. Bremen, however, is inapplicable to this case. The operable contract clause in Bremen was a bona fide forum selection clause

which stated, "[a]ny dispute arising must be treated before the London Court of Justice." Id. at 2 (emphasis supplied). Simply comparing the Bremen clause and the Holt-Harvey clause reveals the Holt-Harvey contract selects the governing law and nothing more.

Harvey's reliance on National Equipment Rental, Ltd. v. Szukhent, 375 U.S. 311 (1964), is similarly misplaced. Szukhent stands for the proposition that by appointing an agent for service of process in the forum, "parties to a contract may agree in advance to submit to the jurisdiction of a given court . . . ." Id. at 316.

Thus, Szukhent permits parties to consent to jurisdiction in places where jurisdiction would not otherwise exist. Szukhent does not limit suit to a particular forum under a forum selection clause, nor does it base jurisdiction on a choice-of-law provision.

Harvey cites no case, and Holt has found none, in which a choice-of-law clause, similar to the one at issue here, has been interpreted as a forum selection clause. Indeed, absent an express statement limiting place of suit to a specifically identified forum, courts consistently refuse to construe choice-of-law clauses as either consent to jurisdiction clauses

or forum selection clauses.[4]

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[4]. For example, in Keaty v. Freeport Indonesia, Inc., 503 F.2d 955, 956 (5th Cir. 1974), the contract stated "[t]his agreement shall be construed and enforceable according to the law of the State of New York and, the parties submit to the jurisdiction of the courts of New York." The Fifth Circuit held this was not a mandatory forum selection clause, and the parties had not waived their right to sue or be sued outside New York; they had merely agreed to submit to the jurisdiction of New York courts if sued there. Similarly, in Citro Florida, Inc. v. Citrovale, S.A., 760 F.2d 1231, 1232 (11th Cir. 1985), jurisdiction was maintained in Florida even though the parties agreed the "place of jurisdiction is Sao Paulo/Brazil." The Eleventh Circuit construed the parties' agreement as nonexclusive consent to jurisdiction in Brazil, not as a mandatory forum selection clause. In Haisten v. Grass Valley Medical Reimbursement Fund, Ltd., 784 F.2d 1392, 1399-1400 (9th Cir. 1986), the Ninth Circuit held the parties' choice-of-law provision, stating the contract would be "governed under the laws of the Cayman Islands, British

[Footnote continued on following page]

Moreover, the cases indicate that even a forum selection clause will not be enforced unless it uses mandatory language requiring disputes "shall" or "must" be brought in a specified locale. Compare Bremen, 407 U.S. at 2 ("Any dispute arising must be treated before the London Court of Justice.") and Scherk v. Alberto-Culver Co., 417 U.S. 506, 508 n.1 (1974) ("All arbitration proceedings shall be held in Paris, France.") (emphasis supplied) with McDonnell Douglas Corp. v. Islamic Republic of Iran, 758 F.2d 341, 346 (8th Cir. 1985), cert. denied, 106

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West Indies," would not alone suffice to block jurisdiction in California where defendant maintained sufficient jurisdictional contacts.

S.Ct. 347 (1985) (contract disputes "should" be resolved through Iranian courts unenforceable as merely a preference) (emphasis supplied).

In summary, the clause in this case is nothing more than a choice-of-law clause, which will not restrict the parties to Oklahoma as the forum for suit.

II.

NEITHER THE DECISION BELOW NOR THE RECORD RAISES THE QUESTION PRESENTED IN THE PETITION

A. Harvey did not Assert this Clause was a Forum Selection Clause Below

Until now, this clause has been consistently regarded by the parties and courts as an ordinary choice-of-law clause. Harvey suddenly imposes a novel and constrained

reading on this clause in an attempt to persuade this Court that Holt and Harvey agreed to apply Oklahoma "procedures" to resolving disputes. By shedding a new, albeit artificial, light on the reading of this provision, Harvey, at best, has manufactured a question of interpretation and construction as to the meaning of a contract provision. Yet, Harvey has never before raised this ordinary fact-bound question of contractual interpretation.[5]

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[5]. While Holt contends Harvey's attempt at reading this clause as a forum selection clause is meritless, as discussed more fully infra at II B, Holt respectfully suggests this Court is not the proper forum for a routine fact finding inquiry regarding contract construction.

Before the trial court, Harvey filed a pre-answer motion to dismiss for lack of personal jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(2). (Holt App. 1a). In his Brief in Support of Motion to Dismiss, Harvey referred to the choice-of-law provision by stating as follows:

> The Agreement between the parties provided that the laws of the State of Oklahoma would govern the transaction and plaintiff came to Oklahoma where it drilled the Campbell Well. Every significant, substantial and continuous activity which forms the basis for the Agreement took place in Oklahoma. For this Court to hold that in personam jurisdiction over this defendant exists in Texas, would be unfair and inequitable.

(Holt App. 22a-23a). The above quoted passage constitutes the extent of Harvey's reference to the provision he

now asserts is a forum clause. Harvey clearly did not raise or even hint to the trial court his belief the parties had contracted to select a forum. Because Harvey did not raise or preserve this issue for review, this issue cannot now be raised.

Considering Harvey did not raise this issue below, it hardly seems cricket for Harvey to accuse the lower courts of having "ignored" a forum clause. In any event, despite Harvey's insistence, the lower courts did not "ignore" this contract provision. Both the trial and appellate court duly accorded this choice-of-law clause its proper weight in the jurisdictional, minimum contacts analysis. See Memorandum Order (Harvey App. 4a); see also Holt Oil & Gas Corp. v. Harvey,

801 F.2d 773, 778 (5th Cir. 1986) (Harvey App. 17a); accord Burger King Corp. v. Rudzewicz, 471 U.S. 462, ____, 105 S.Ct. 2174, 2187 (1985) (discussing relevance of choice-of-law provision to minimum contacts analysis).

B. The Question Presented for Review Necessitates Fact Finding on Issues Neither Raised nor Decided Below

By contending their contract selected a forum for dispute resolution, Harvey raises for the first time, on Petition of Certiorari, a fact-bound routine question of contract construction and interpretation. If the clause at issue were to be recast as a forum selection clause, its enforceability would depend on numerous factual questions which were neither raised nor resolved below and are not

ripe for review by this Court.

Before a court will enforce a forum selection clause, it will scrutinize the clause to determine whether it meets the guidelines this Court established in Bremen. According to the Bremen decision, a forum selection clause should not be enforced if enforcement of the clause would be unreasonable and unjust, or the clause is invalid due to fraud or overreaching, or enforcement of the clause would be contrary to the public policy of the forum. Bremen, 407 U.S. at 15.

Because this clause has not been portrayed as a forum clause until now, no court has addressed the myriad of factual issues informing the Bremen

test. For example, whether a forum clause is unreasonable and unjust turns on whether suit in the contractual forum would be so gravely difficult and inconvenient that a party is effectually deprived of its day in court. Id. at 18. In determining whether fraud or overreaching invalidates a forum clause, a court must consider whether the agreement was in fact freely bargained for. In so doing, the court assesses the parties' relationship to determine if undue influence or overweening bargaining power infected formation of the contract. Id. at 12. Factors defining the parties' relationship include whether the parties are sophisticated business persons, whether the parties were represented by counsel, and

whether the agreement at issue is a printed form contract containing boilerplate language. Id. at 13 n.14. Whether a forum clause violates a strong public policy in the state where suit is brought necessitates determining the forum state's position as to such clauses.[6] Id. at 15.

Of course any allegation that contract language is ambiguous requires assessing the intent of the parties. Intent also is a factual question, and what Holt and Harvey intended their choice-of-law clause to mean -- other

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[6]. Neither court below has addressed Texas' clear disinclination toward forum selection clauses. See Fidelity Union Life Insurance Co. v. Evans, 477 S.W.2d 535, 537 (Tex. 1972) ("We hold that the fixing of venue by contract . . . is invalid and cannot be the subject of private contract.").

than what it said -- was never addressed. Thus, the record is void of evidence as to whether the parties intended this choice-of-law clause to act as a choice-of-forum clause. Even if the Court were to assume, as Harvey insists, that Harvey meant his rejection of the letter agreement to convey a proposal for exclusive jurisdiction, (Petition at 4), there is neither reason to believe nor evidence to suggest Holt either knew or had reason to know of Harvey's meaning. See Zapata Marine Service v. O/Y Finnlines, Ltd., 571 F.2d 208, 209 (5th Cir. 1978); 3 A. Corbin, Contracts §537 (1960). There is no evidence Holt intended to waive its right to sue and be sued elsewhere merely by agreeing to

apply Oklahoma law to resolution of their disputes.

If this choice-of-law clause were to be read as a forum selection clause, these fact specific questions and issues would have to be resolved, and Holt respectfully suggests this Court is not the proper forum to address such questions when such questions were not raised below.

C. Objection to Venue is Waived Pursuant to Federal Rule of Civil Procedure 12(h)(1)

Essentially, the forum selection argument Harvey makes to this Court maintains Holt brought suit in the wrong place, that is, improper venue. To argue a forum selection clause deprives a court of jurisdiction simply misses the mark. When parties

contractually agree to a forum, they do not divest other forums of jurisdiction. Rather, in stipulating a forum, the parties ask other courts to decline jurisdiction and give effect to their agreement. Such a request is essentially a motion to transfer venue.

Harvey cannot cloak this venue objection with a jurisdictional mantle. Harvey waived this objection to venue by failing to raise it in his initial pre-answer motion to dismiss, filed April 6, 1983, in which he objected only to personal jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(2). (Holt App. 1a). Federal Rule of Civil Procedure 12(h)(1) provides objection to venue is

waived if omitted from a pre-answer motion made pursuant to Federal Rule of Civil Procedure 12(b).

III.

NO DUE PROCESS CONCERNS ARE RAISED BY THIS PETITION

A. Harvey Misperceives the Interaction Between Due Process and Forum Clauses

Harvey contends due process prohibits the exercise of in personam jurisdiction by the courts of a state when the parties to a contract have structured their agreement to select another state as the forum. As discussed above, the parties to this contract have not structured their agreement to select any particular forum state; they simply agreed to the selection of the governing law. In addition, failure to enforce a forum

selection clause does not invoke due process concerns. Rather, it is the converse situation, when forum clauses are enforced under unreasonable and unjust circumstances, that raises due process concerns. "Where such forum-selection provisions have been obtained through 'freely negotiated' agreements and are not 'unreasonable and unjust,' Bremen, 407 U.S. 1, 15 (1972), their enforcement does not offend due process." Burger King, 471 U.S. at ___, 105 S.Ct. at 2182 n.14.

Regardless of whether this clause is a forum clause as Harvey now contends, it is clear Harvey misperceives the effect of forum selection clauses in general. Harvey suggests a forum clause binds the

parties and courts and that such clauses are enforceable per se, at the risk of offending due process. The clear and well established law regarding forum selection clauses, however, is that such clauses do not oust the jurisdiction of all courts save those stipulated in the clause. Rather, in stipulating a forum, the parties ask other courts to decline jurisdiction and give effect to their agreement. It remains open to either party to present evidence as to circumstances negating enforcement of the clause. See LFC Lessors, Inc. v. Pacific Sewer Maintenance Corp., 739 F.2d 4, 6 (1st Cir. 1984); see also Central Contracting Co. v. Maryland Casualty Co., 367 F.2d 341, 345 (3d Cir. 1966).

B. Harvey Misperceives the Interaction Between Due Process and Jurisdiction

In the context of personal jurisdiction, the due process clause "protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful contacts, ties, or relations." Burger King, 471 U.S. at _____, 105 S.Ct. at 2181-82 (quoting International Shoe Co. v. Washington, 326 U.S. 310, 319 (1945)). Under the classic precept enunciated in International Shoe, due process permits personal jurisdiction over a defendant in any state where the defendant has sufficient minimum contacts that the maintenance of the suit does not offend "traditional

notions of fair play and substantial justice." 326 U.S. at 316 (quoting Millikin v. Meyer, 311 U.S. 457, 463 (1940)); see also Asahi Metal Industry Co., Ltd. v. Superior Court of California, 107 S.Ct. 1026, 55 U.S.L.W. 4197, 4200 (1987); Calder v. Jones, 465 U.S. 783, 788 (1984). Thus, a plaintiff "may choose to bring suit in any forum with which the defendant has 'certain minimum contacts'" such that due process is not offended. See Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 780 (1984) (emphasis supplied).

Clearly then, personal jurisdiction is not an exclusive concept existing in only one place at one time. Rather, the concept of jurisdiction and minimum contacts contemplates a defendant is

amenable to suit in more than one state simultaneously. A plaintiff need only show a defendant maintains the requisite minimum contacts with a state to establish it is both fair and reasonable to require the defendant to defend in the forum. Furthermore, a defendant's amenability to suit in a forum need not be deliberate or intentional.

> The plaintiff's demonstration of certain historical facts may make clear to the court that it has personal jurisdiction over the defendant as a matter of law -- i.e., certain factual showings will have legal consequences -- . . . . The actions of the defendant may amount to a legal submission to the jurisdiction of the court, whether voluntary or not.

Insurance Corp. of Ireland Ltd. v. Compagnie Des Bauxites De Guinee, 456 U.S. 694, 704-05 (1982). Undoubtedly, Harvey may be sued in many places; as

the trial and appellate courts both found, Texas is just one such place.

Both the trial and appellate courts found Harvey had numerous purposeful contacts with the State of Texas[7] and that maintenance of suit in Texas did not offend traditional notions of fair play and substantial justice. Such findings fully comport with due process.

C. Harvey has Asserted no Prejudice of Constitutional Magnitude

Harvey has identified no specific difficulties or prejudice in being

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7. Indeed, Harvey admitted he was "doing business" in Texas in his Motion to Dismiss before the trial court. "Defendant does not challenge whether defendant was doing business in Texas within the literal definition of [the Texas long-arm statute]." (Holt App. 10a).

subject to suit in Texas -- not even the inconvenience and expense of traveling to Texas from Oklahoma.[8] No facts have been alleged, and indeed no such facts exist, to show the trial in Texas was so gravely difficult as to achieve constitutional magnitude by putting Harvey at a severe disadvantage. See Burger King, 471 U.S. at _____, 105 S.Ct. at 2190 (failure to demonstrate how jurisdiction in a particular forum is fundamentally unfair does not offend

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8. Harvey was not in fact inconvenienced. As the appellate court noted, "Harvey was in Texas during the week this case was tried to participate in a golf tournament." 801 F.2d at 780 (Harvey App. 21a).

due process); see also McGee v. International Life Insurance Co., 355 U.S. 220, 224 (1957).

IV.

THIS DECISION CREATES NO CONFLICT AMONG THE CIRCUITS AS TO THE ROLE A CHOICE-OF-LAW CLAUSE PLAYS IN DETERMINING IN PERSONAM JURISDICTION

The Fifth Circuit's decision in this case creates no conflict among the circuits. Contrary to Harvey's assertion, Burger King, Sea Lift, Inc. v. Refinadora Costarricense De Petroleo, S.A., 792 F.2d 989 (11th Cir. 1986), and Hydrokinetics, Inc. v. Alaska Mechanical, Inc., 700 F.2d 1026 (5th Cir. 1983), cert. denied, 466 U.S. 962 (1984), do not give controling weight to choice-of-law clauses on the question of in personam jurisdiction in contract cases.

Indeed, in Burger King, this Court specifically stated a choice-of-law "provision standing alone would be insufficient to confer jurisdiction." 471 U.S. at _____, 105 S.Ct. at 2187.[9]

A review of Sea Lift also indicates Harvey's argument is misconceived. The contract at issue in Sea Lift contained a clause selecting English law as the governing law. In finding Florida lacked jurisdiction over the defendant,

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9. In his Petition, Harvey also admits "choice-of-law clauses merely provide that the law of another state will 'govern', which allows any forum to apply the law chosen." (Petition at 15). Not only is the Holt-Harvey clause entitled "Governing Law", but the clause itself states the agreement "shall be governed" by Oklahoma law. Thus, Harvey admits this clause is nothing more than a choice-of-law clause and cannot, despite his tortuous reading, be enforced as a forum selection clause.

however, the Eleventh Circuit in no way stated or implied that as a result of the choice-of-law clause England was the only forum in which suit could be brought.[10] The court merely stated the parties' choice of English law was one factor, among many, showing the defendant had not purposefully availed itself of the benefits and protections of Florida law. The Eleventh Circuit's use of a choice-of-law clause in Sea Lift fully comports with the appellate

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10. In addition, Sea Lift is a "specific" jurisdiction case, and thus, analysis focused on the relationship among the defendant, the forum and the litigation. Harvey was found to be subject to "general" jurisdiction because his contacts with Texas were continuous and systematic. See Helicopteros Nacionales de Columbia, S.A. v. Hale, 466 U.S. 408, ____, 104 S.Ct. 1868, 1872 nn.8 & 9 (1984).

court's decision below in which the Fifth Circuit found that despite the parties' choice of Oklahoma law, Harvey had sufficient purposeful contacts to subject him to jurisdiction in Texas. 801 F.2d at 778 (court cites Burger King as authority for relevance of choice-of-law to minimum contacts analysis).

Similarly, in Hydrokinetics, the Fifth Circuit noted the choice of Alaska law to govern the parties' relationship was a factor in considering whether defendant had made a calculated effort to engage in or solicit business in Texas.[11]

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[11]. Again, jurisdiction in Hydrokinetics was denied on the basis of specific, rather than general, jurisdiction.

Hydrokinetics' references to the parties' choice-of-law provision in the contract are juxtaposed against the fact the contract was entered into in Texas. Thus, the court emphasizes the choice-of-law provision merely to counter the long-arm concept 'that attaches jurisdiction to the place where the contract is entered into and, consequently, submits the parties to jurisdiction there. Thus, the court states:

> [A]lthough the bargain may have been cemented in Texas when Hydrokinetics accepted Alaska Mechanical's offer, the significance of that is diminshed by the provision specifying that the agreement be governed and construed according to the laws of the state of Alaska.

700 F.2d at 1029 (similar statements occur at 700 F.2d 1030 & 1031).

Although Harvey insists Hydrokinetics conflicts with the appellate court's decision in this case, Harvey neglects to point out the appellate court quoted the above statement from Hydrokinetics almost verbatim in discussing the parties' choice-of-law provision:

> Although the contractual relationship between Holt and Harvey may have been cemented in Texas, the significance of this fact is diminished by the contract provision specifying that Oklahoma law would govern the agreement.

801 F.2d at 778. (Harvey App. 16a-17a).

Clearly, the decision below accords with Hydrokinetics, Sea Lift and Burger King, and Harvey's claim that this decision conflicts with other circuits and within the Fifth Circuit is totally without merit.

CONCLUSION

On Petition for Writ of Certiorari, Petitioner Ralph L. Harvey presents a single question for review by this Court. For the reasons stated above, Respondents Holt Oil & Gas Corporation and Faywin Investment Pty. Ltd. respectfully request this Court deny the Petition, as nothing raised therein constitutes a proper question for review.

Respectfully submitted,

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Patricia J. Kendall

CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the Brief of Respondents in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit were mailed, by Certified Mail Return Receipt Requested, to Mr. William Pannill, 1600 Two Houston Center, 909 Fanin, Houston, Texas 77010-1007, counsel for Petitioner, on this 20th day of March, 1987. I further certify that all parties required to be served have been served.

/s/ C. Steven Matlock, Jr.
C. Steven Matlock, Jr.

1646P

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS,
DALLAS DIVISION

HOLT OIL & GAS CORPORATION,	)	
Plaintiff,	)	
v.	)	No. CA3-83-0277G
RALPH L. HARVEY,	)	
Defendant.	)	

MOTION TO DISMISS

Defendant, Ralph L. Harvey, pursuant to Rule 12(b)(2) of the Federal Rules of Civil Procedure, moves this Court to dismiss the Complaint for the reason that this Court cannot exercise jurisdiction over the person of the defendant. The requisite contacts of defendant with the State of Texas necessary to meet the requirement

of due process under the United States Constitution are insufficient to sustain this Court's exercise of in personam jurisdiction over a non-resident defendant. The exercise of jurisdiction over the person of defendant by a court sitting in Texas would offend traditional notions of fair play and substantial justice. A Brief in Support of the Motion to Dismiss is filed simultaneously herewith.

WHEREFORE, defendant, Ralph L. Harvey, requests that the Court dismiss the Complaint for lack of jurisdiction over the person of defendant.

/s/Doneen Douglas Jones
Harry H. Selph, II
Doneen Douglas Jones
FELLERS, SNIDER, BLANKENSHIP,
BAILEY & TIPPENS
2400 First National Center
Oklahoma City, Oklahoma 73102
405/232-0621

and

Roger E. Beecham
BEECHAM, BROWN & LONGENECKER
1010 Dallas Federal Savings Tower
8333 Douglas
Dallas, Texas 75225
214/750-0050
Bar Card No. 02036500

Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of April, 1983, a true and correct copy of the above and foregoing Motion to Dismiss and Motion to Strike was mailed, postage prepaid, to C. Steven Matlock, Esq., Jackson, Walker, Winstead, Cantwell & Miller, 4300 InterFirst One, Dallas, Texas 75202, attorney for plaintiff.

/s/ Doneen Douglas Jones
Doneen Douglas Jones

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS,
DALLAS DIVISION

HOLT OIL & GAS CORPORATION,	)	
Plaintiff,	)	
v.	)	No. CA3-83-0277G
RALPH L. HARVEY,	)	
Defendant.	)	

BRIEF IN SUPPORT OF MOTION TO DISMISS

This Brief is filed on behalf of defendant, Ralph L. Harvey, in support of his Motion to Dismiss. Plaintiff obtained service of process on defendant under the Long Arm Statute of Texas, Rev. Civ. Stat. Ann. Art. 2031b. Defendant does not have sufficient contacts with the State of Texas to sustain an exercise by this

Court of in personam jurisdiction consistent with the due process requirements of the United States Constitution.

This action arises from an alleged breach by defendant of an operating agreement. On November 25, 1983, plaintiff and defendant entered into an Operating Agreement (hereinafter the "Agreement") a copy of which is attached to the Complaint. The Agreement was modified by the certain letter, dated November 24, 1981, which is attached hereto as Exhibit "A" and made a part hereof by this reference. Under the Agreement, plaintiff, as operator, agreed to explore and develop an oil and gas leasehold in Oklahoma known as the Campbell Prospect located

in the Southwest Quarter (SW/4) of Section Eleven (11), Township Two North (T2N), Range Twenty-Three East Cimarron Meridian (R23ECM), Beaver County, State of Oklahoma (the "Subject Property"). Plaintiff has drilled a well (the "Campbell Well") on the Subject Property. Plaintiff contends that defendant breached the Agreement by failure to pay all of his pro rata share of the operating expenses of the Campbell Well. Plaintiff further alleges that defendant committed a tort by representing to plaintiff that he would pay all sums under the Agreement, that plaintiff relied upon this representation and, therefore, has suffered damages.

STATEMENT OF FACTS

Plaintiff is a Texas corporation with its principal place of business in Dallas, Texas. Defendant is an individual who resides in the State of Oklahoma. Defendant owns certain oil and gas leasehold rights covering a portion of the Subject Property. Defendant's initial contacts with plaintiff were in regard to a proposed farmout of defendant's acreage to plaintiff or participation by defendant in the Campbell Well and were originated by plaintiff via telephone conversation and written correspondence. Defendant chose to participate in the Campbell Well and subsequent thereto plaintiff and defendant communicated by telegram and

by correspondence on the progress of drilling and of attempted completion of the Campbell Well, expenses incurred therein, approval to plug and abandon the well and solicitation in regard to defendant's approval of well recompletion expenses. All correspondence and telegrams between the parties deal with the Campbell Well located in the State of Oklahoma. On three occasions, defendant sent checks (totalling $66,478.47) to plaintiff at its office in Dallas, Texas, in payment of defendant's pro rata share of the expenses of drilling and attempted completion of the Campbell Well.

Other than the aforementioned contacts, defendant has not transacted or engaged in any business activity,

whether related or unrelated to this suit, within the State of Texas. Likewise, defendant does not own property within the State of Texas, has no bank accounts within the State of Texas, has not appointed any agent for service of process and maintains no office or residence within the State of Texas. No contact with the State of Texas exists except the communications, most of which were initiated by plaintiff, in regard to the Campbell Well and payment by defendant on three occasions to plaintiff's offices located in Texas. Attached hereto, marked Exhibit "B" and made a part hereof by this reference is the Affidavit of Ralph L. Harvey, which sets forth his statement as to the

absence of contacts with the State of Texas.

THE CONTACTS OF DEFENDANT WITH TEXAS DO NOT CONSTITUTE MINIMUM CONTACTS SUFFICIENT TO MAKE DEFENDANT AMENABLE TO THE JURISDICTION OF A TEXAS COURT

Defendant does not challenge whether defendant was doing business in Texas within the literal definition of Tex. Rev. Civ. Stat. Ann. Art. 2031b(4). He does challenge whether the federal constitutional requirements of due process permit this Court to exercise jurisdiction over the person of a non-resident defendant. Any inquiry into whether the exercise of personal jurisdiction is permissible in a particular case depends upon the facts of each case. 2 J. Moore, Moore's Federal Practice (2d ed. 1974),

Paragraph 4.25[5]. The contacts of defendant with Texas are insufficient to sustain a finding that defendant is amenable to the jurisdiction of the Texas courts.

The United States Supreme Court has long emphasized that the Constitution requires certain minimum contacts between a defendant and the forum state before the courts of the forum state properly may exert in personam jurisdiction. International Shoe Co. v. Washington, 326 U.S. 310, 90 L.Ed. 95, 66 S. Ct. 154 (1945); Hanson v. Denckla, 357 U.S. 235, 2 L.Ed. 1283, 78 S.Ct. 1228 (1958). These limitations are more than mere guarantees of immunity from defending in an inconvenient or distant forum. Due

process requires that such limitations be observed.

Due process inquiry into personal jurisdiction centers around the relationship of the defendant, the forum and the litigation. Shaffer v. Heitner, 433 U.S. 186, 53 L.Ed. 2d 683, 97 S. Ct. 2579 (1977). Jurisdiction must be reasonable in light of the contacts of defendant with the forum state. Such reasonableness depends upon the nature and the quality of the defendant's activity. International Shoe Co. v. Washington, supra.

A dual test exists for determining whether a court may exercise its jurisdiction without depriving a non-resident defendant of due process of law. First, due process requires

minimum contacts of the defendant with the state which result from an affirmative act of the defendant. Second, it must be fair and reasonable to require the defendant to come into the state and defend the action. Product Promotions, Inc. v. Cousteau, 495 F.2d 483 (5 Cir. 1974).

In essence, the contact of a non-resident defendant with the forum must not be fortuitous. The threshold inquiry is whether the defendant purposefully availed himself of the benefits and protection of the forum's laws so that maintenance of the lawsuit does not offend traditional notions of fair play and substantial justice. International Shoe Co. v. Washington, 326 U.S. 310, 90 L.Ed. 95, 66 S. Ct.

154 (1945); Hanson v. Denckla, 357 U.S. 235, 2 L.Ed. 2d 1283, 78 S. Ct. 1228 (1958). The Texas business activity by the non-resident defendant must be sufficient to indicate a purposeful enjoyment of the benefits and protections of Texas law. Benjamin v. Western Boat Building Corporation, 472 F.2d 723 (5th Cir. 1973). The contacts of defendant herein fall short of the requirements of due process. The facts conclusively show that defendant did not purposefully avail himself of the benefits and protections of the forum's law.

The Agreement concerned the exploration and the drilling of a well on a tract of land located within the State of Oklahoma. Article XIV(B) of

the Agreement states:

> "B. Governing Law: The essential validity of this agreement and all matters pertaining thereto, including, but not limited to, matters of performance, non-performance, breach, remedies, procedures, rights, duties and interpretation or construction, shall be governed and determined by the law of the state in which the Contract Area is located. If the Contract Area is in two or more states, the law of the state where most of the land in the Contract Area is located shall govern."

There is no dispute that the "contract area" (Subject Property) is located in Oklahoma. Clearly, defendant was expecting the benefits and the protections of the laws of the State of Oklahoma. Defendant could not reasonably foresee the need to invoke the benefits and protections of Texas law.

Further, the minimal contact of defendant with the State of Texas in transmitting checks for payment of his pro rata expenses is not an activity sufficient to indicate an affirmative act by defendant to invoke the benefits and protections of the laws of Texas. In U-Anchor Advertising, Inc. v. Burt, 553 S.W.2d 760 (Tex. 1977), U-Anchor, a Texas corporation, solicited and entered into a contract with Burt, an Oklahoma resident, for the placement of five advertising displays for Burt at various Oklahoma highway locations. Burt's only contact with Texas consisted of the remittance of five or six payments to U-Anchor at its office in Amarillo, Texas. The Court held that Burt's mailing of payments to

U-Anchor at its office in Texas would not support an inference that Burt intended to invoke the benefits and protections of Texas law. The minimal and fortuitous contact of Burt with Texas could not sustain exercise of jurisdiction by a court sitting in Texas. If the contacts in U-Anchor were considered minimal and fortuitous, a fortiori, defendant's payment to plaintiff in Texas does not rise to the level of contacts necessary for a Texas court to exercise in personam jurisdiction over this defendant.

Additionally, the Fifth Circuit has recognized that communications between a plaintiff and a defendant are insufficient contacts to merit an exercise of in personam jurisdiction.

In Benjamin v. Western Boat Building Corporation, 472 F.2d 723 (5th Cir. 1973), the Court held that 50 letters between Benjamin and Western Boat could not form a basis for an exercise of in personam jurisdiction over Western Boat. Benjamin, a Louisiana resident, contracted with Western Boat, a Washington corporation, to design and construct a vessel. After submitting a bid for the construction of the vessel, Western Boat received a letter and contract from Benjamin. The contract was executed and Western Boat constructed the vessel in the State of Washington. Benjamin and Western Boat communicated both by telephone and through written correspondence about particulars of the construction. The

majority of the communications were initiated by Benjamin. The Fifth Circuit, in reversing the decision of the lower court, held that this substantially unilateral activity by Benjamin could not satisfy the minimum contacts required by due process.

The facts of the case at bar are very similar to those of the Benjamin case. Here, as there, the plaintiff originated the majority of the correspondence which concerned the particulars of the performance of the Agreement between the parties. In the case at bar, the defendant responded only as was necessary. These contacts simply do not indicate a purposeful availment by this defendant of the benefits and protections of the laws of

the State of Texas. Even considering both the communications and the remittance of payments by defendant to plaintiff in Texas, defendant has not performed an affirmative act indicating substantial, continuous and regular activity within the State of Texas. The limitations of due process have not and cannot be satisfied under the facts of the case at bar.

Another basis for exerting in personam jurisdiction is that the defendant's contacts with the forum be deliberate such that an expectation of profit be derived therefrom. Product Promotions, Inc. v. Cousteau, supra. Defendant's contacts with Texas are not founded upon an expectation that defendant would profit from business

transacted in Texas. Any expectation of profit came from development of defendant's leasehold interest in property located in Oklahoma. Merely because development was undertaken by a Texas corporation does not indicate that defendant purposely availed himself of the benefits and protections of Texas law. In fact, just the opposite is true under the Agreement. Defendant expected profit, if any, to flow from his contacts with Oklahoma, specifically development of the leasehold interest in Oklahoma.

The contacts of defendant with Texas are minimal and fortuitous. To require defendant under the facts of this case to submit to the jurisdiction of a court sitting in Texas would

offend traditional notions of fair play and substantial justice. Consideration such as the quality, nature and extent of the activities in the forum state; the relative convenience of the parties; the benefits and protections of the law of the forum and the basic equities of the situation determine whether traditional notions of fair play and substantial justice have been offended. U-Anchor Advertising, Inc. v. Burt, supra. These considerations clearly show that this Court should not exercise jurisdiction over the person of defendant.

This action arises from the drilling and attempted completion of an oil and gas well by plaintiff in the State of Oklahoma. The Agreement

between the parties provided that the laws of the State of Oklahoma would govern the transaction and plaintiff came to Oklahoma where it drilled the Campbell Well. Every significant, substantial and continuous activity which forms the basis for the Agreement took place in Oklahoma. For this Court to hold that in personam jurisdiction over this defendant exists in Texas, would be unfair and inequitable.

Defendant's minimal fortuitous contacts do not make him amenable to the jurisdiction of this Texas Court. The due process requirements necessary of in personam jurisdiction cannot be satisfied under the facts of the case at bar. The Complaint should be dismissed for lack of in personam

jurisdiction over defendant.

/s/Harry H. Selph, II
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214/750-0050
Bar Card No. 02036500

Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of April, 1983, a true and correct copy of the above and foregoing Brief in Support of Motion to Dismiss and Motion to Strike was mailed, postage prepaid, to C. Steven Matlock, Esq., Jackson, Walker, Winstead, Cantwell & Miller, 4300 InterFirst One, Dallas, Texas 75202, attorney for plaintiff.

/s/Doneen Douglas Jones
Doneen Douglas Jones

BEST AVA

25a

RALPH L. HARVEY, PRESIDENT
LARRY J. GORDON, VICE PRESIDENT
MIDLAND DEPT.

Marlin OIL CORPORATION

2700 FIRST NATIONAL CENTER OKLAHOMA CITY, OKLAHOMA 73102 405-232-3267

November 24, 1981

NOV 2 6 198

Holt Oil & Gas Corporation
Campbell Center II, Suite 1255
8150 North Central Expressway
Dallas, TX 75206

Attention: Mr. Tyrrell Hearn

RE: SW/4 Section 11-2N-23ECM
Beaver County, Oklahoma

Gentlemen:

Receipt is acknowledged of your letter dated November 18, 1981, in which you enclosed your invoice No. 246, two copies of a Letter Agreement, and an Operating Agreement pertaining to the captioned unit. I am hereby rejecting the letter agreement and invoice submitted, as I am willing to participate and pay my pro-rata share of the drilling expenses, including the drilling title opinion, so long as the invoices are accompanied with a copy of the back-up invoices. I am unwilling to pay for the drilling and completion charges in advance, and any part of Holt's acquisition, evaluation, legal and acreage costs. I am willing to sign the Operating Agreement submitted subject to the following changes:

1) Article IV B. Loss of Title:

   a) Subsections 1 and 2: The original text of the Operating Agreement shall be reinstated.

   b) Subsection 3: Shall be amended to read as follows: "3. Other Losses: All losses incurred, other than those set forth in Article IV B.1 and IV B.2 above, shall not be considered failure of title, but shall be individual losses and shall be borne by the parties in the same manner as outlined in Article IV, Section B, Subsection 1.

2) Article V C. Employees: The original text of the Operating Agreement shall be reinstated.

3) Article VI A. Initial Well: As the well has already been spudded, change this from a location selected by the Operator to the C SE/4 SW/4 of Section 11-2N-23ECM, Beaver County, Oklahoma.

EXHIBIT A

Exhibit A

ILABLE COPY

4) Article VI B. Subsequent Operations: Shall be deleted in its entirety and the attached Article VI B shall be used.

5) Article VI E. Abandonment of Wells: To remain consistent with the deletion on Page 8, Line 1, the sentence beginning in the middle of Page 7, Line 67 shall be deleted in its entirety.

6) Article VII D. Limitations of Expenditures: Subsection 3, Page 9, Lines 30 and 38. The twenty thousand dollars shall be changed to ten thousand dollars.

7) Article VII F. Rentals, Shut-in Well Payments and Minimum Royalties: Page 9, Lines 57, 58, 59 and 60: The original text of the Operating Agreement shall be reinstated.

8) Article XIII Term of Agreement: Option 1 shall not be used, but Option 2 shall be used subject to the following changes:

   a) Page 14, Line 4: The time frame of 120 days shall be used.

   b) Page 14, Line 11: The time frame of 120 days shall be used.

9) Article XV Other Provisions: All other provisions shall be deleted.

10) Exhibit "A" shall be amended as follows:

    IV. Add Mr. Harvey's telephone number: 405-232-3267

11) Exhibit "C" II Direct Charges: Subsection 1. The phrase "plus consultants' fees for maintaining delay rentals and lease records", shall be deleted.

I am willing to participate in the drilling of the #1 Campbell in the SE/4 SW/4 of the captioned section, and I have enclosed your A.F.E. subject to the above changes to Holt's proposed Operating Agreement. This offer to participate will terminate on the date the No. 1 Campbell reaches total depth if I have not received confirmation of Holt's acceptance of these changes. If these changes are acceptable, please sign and return one copy of this letter to my office.

Respectfully,

Ralph L. Harvey

Ralph L. Harvey

RLH/ph

The above changes are agreed to and accepted this 25th day of November, 1981.

HOLT OIL AND GAS CORPORATION

By: Clyde Cooder

STATE OF OKLAHOMA)
) SS
COUNTY OF OKLAHOMA)

Ralph L. Harvey, being duly sworn upon oath, deposes and says:

1. I am the defendant in an action styled Holt Oil and Gas Corporation v. Ralph L. Harvey, brought in the United States District Court for the Northern District of Texas, Dallas Division, civil action No. CA3-83-0277G. I am making this affidavit in support of the Motion to Dismiss the Complaint for lack of in personam jurisdiction.

2. I do not own any real property or personal property in Texas.

3. I do not maintain any office or residence in Texas.

4. I do not now have any agent in Texas.

5. I do not now have any bank account in Texas.

6. I do not conduct any business in my individual capacity in Texas.

7. I have no registered office within Texas and have never authorized an agent to accept service of process within Texas.

EXHIBIT B.

/s/Ralph L. Harvey
Ralph L. Harvey

Subscribed and sworn to before me this 4th day of April, 1983.

/s/Joyce Jennings
Notary Public

My commission expires: 12-14-83